

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-1435

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee.

-against-

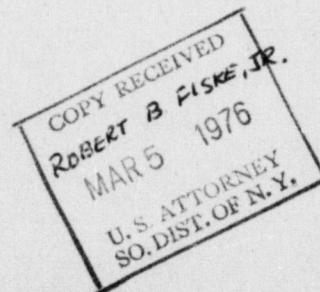
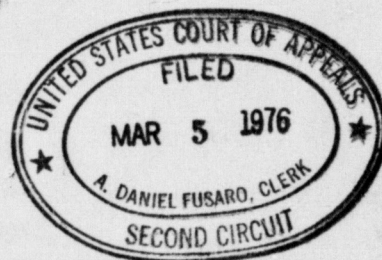
FRANCISCO LI GANOZA,

Appellant.

Appellant's Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 75-1435

- against -

FRANCISCO LI GANOZA,

Appellant

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered the 18th day of September 1975 in the United States District Court for the Southern District of New York; Honorable Charles H. Tenney presiding. As a consequence of appellant's conviction by a jury, appellant was sentenced to a term of imprisonment for seven (7) years and a term of special parole for three (3) years for conspiring to import heroin in violation of U.S.C. 120, Sections 812, 841 (a)(1); 841 (b)(A); 951 (a)(1); 960 (a)(1); 960 (b)(1).

ISSUES PRESENTED FOR REVIEW

1. Was there sufficient independent, non-hearsay evidence that appellant entered the conspiracy?
2. Whether the variance of proof between an indictment charging one conspiracy and the proof at trial showing at least four separate and distinct conspiracies affected appellant's right to be tried for the crime charged and not have evidence of other conspiracies spill over into the jury's deliberation of appellant's guilt of innocence?

3. Whether improprieties engaged in by the prosecution in his opening statement to the jury classifying his witnesses by color; regaling the jury with the overwhelming evidence possessed by the government that the jury would not hear for the sake of expediency and suggesting that the accused waived a constitutional right to remain silent by presenting evidence which the assistant was not presenting to the jury; and in summation by a covert reference to the appellant's character and his failure to testify?

STATEMENT OF THE FACTS

Undercover police officers Frank Mingo and Herbert Wright's dealings with Jimmy Lam (Lam Lek Chong) from January 1, 1974 to May 30, 1974, the day of Lam's arrest and appellant's arrest, provide the nexus of three otherwise unconnected conspiracies. It was Mingo's introduction to James Chan, an employee of Lam's travel agency - Oriental Travel - by an informant on January 21, 1974 that initiated a course of dealings between the undercover officers and Lam. However it was not until January 24, 1974 after Mingo had telephoned Lam at a telephone number suggested by James Chan that Mingo met Lam at the offices of the travel agency at 217 Park Row in New York City. (151, 152, 332)*.

At this first of many meetings a purchase of one and a half pounds of heroin at a cost of \$25,000 to \$28,000 per pound was arranged through accommodating acquaintances of Lam. A comment by Mingo that he had quite a bit of money became the seed of a plan that resulted in undercover police officers Mingo and Wright

*() References are to pages of the trial transcript.

travelling to Hong Kong. At this time, however, Lam merely suggested that a female courier from Hong Kong with heroin at \$2,000 a pound strapped to her body would be cheaper than the \$25,000-\$28,000 price in New York City. Mingo expressed his skepticism of ever receiving the heroin. Another plan to have heroin mailed to the United States was left in the air - Lam to telephone Mingo. This call was the first of a host of recorded conversations. In this conversation Lam warned Mingo of being followed and gave him a license number of what turned out to be a government surveillance vehicle backing up Mingo which Lam happened to see driving away shortly after Mingo left. (152, 160, 165).

A telephone conversation (recorded) on January 25, 1974 between Mingo and Lam - set up a meeting at the Dixie Hotel on 42nd Street in New York. Mingo attended this meeting without his escort police officer Wright and met the "fat guy" and someone named Michael. A sample was handed Mingo in a cigarette case. Other telephone conversations with Lam took place where Lam would put either the "fat guy" or Michael on the telephone. A proposal that Mingo buy 1-1/2 pounds of heroin at \$28,000 per pound, total price of \$42,000, resulted in a purchase. A meeting of Mingo and his partner at the Skyline Motel and a ride to Chinatown and another drive uptown finally resulted in an exchange of money and narcotics on 45th Street and 11th Avenue. Mingo and Wright represented the government -

Sonny, Robert ("fat guy") and Michael the sellers; Robert and Wright making the actual transfers. A \$14,000 shortage cost the government \$1,000. This money was paid to Lam. However, Sonny, Michael and Robert would not allow this payment as part payment of the balance. At further meetings uptown the government paid its outstanding debt to Messrs. Lam, Sonny, Michael and Robert (the latter three unindicted co-conspirators). A discussion concerning smuggling heroin from Hong Kong was tabled until Lam's return from a scheduled trip to London. (166-172, 342, 343, 346-351, 579-586, 599 817-819).

With his trip to London out of the way Lam explored the possibilities of smuggling heroin from Hong Kong with zest; promising an introduction to his connection who would show Mingo and Wright how to smuggle 100 pounds of heroin to the United States. At a February 22nd meeting Lam told Mingo and Wright that he already sent someone to Hong Kong to set up the deal. A request was made for \$500 or \$600 to defray this expense. A like amount was requested by Lam from Wright at a meeting between them without Mingo at the Biltmore Hotel; the \$500 was needed by Lam to work on either "the producer", "arranger" or the boss of Chinatown regarding smuggling heroin from Hong Kong. A dispute between Wright and Lam followed a demand by Lam for \$3,000 for expenses. This dispute was salved by the payment of \$1,000. After much speculation on the best method to get a 100 pounds of heroin

from Hong Kong to New York Wright asked Lam if he knew someone in the import-export business. (173-179, 361, 362, 366, 367, 369-372, 591-596, 606-612, 852, 880).

In response to this request Yuk Choi Chung an importer and exporter of food products was introduced to Mingo and Wright as David Chan at a March 12 meeting at the Squire Motel in New York City. According to Lam's scheme - Chan (a name Mr. Chung denies using) was to pack the heroin into cans of soybeans and ship them through his company to Virginia. Lam told Mingo this plan in a telephone conversation March 8, 1974 - before Chung met the two undercover officers or had spoken to Lam concerning attendance at a March 12th meeting. This session and a subsequent meeting on March 19th was staged for government monitoring. Mr. Chung spoke in Chinese; his English being limited. Mr. Lam provided a free translation of Mr. Chung into English - excluding all qualifications and reservations Mr. Chung expressed about this plan to Lam at these meetings. And at one point Lam made promises which Mr. Chung specifically forbade. These meetings terminated without any details having been decided. Mr. Chung left for Hong Kong March 31 on export and import business with a ticket purchased from Lam February 12, long before Lam approached him about this matter. Lam, however, told the officers that Chan was going to Hong Kong to make arrangements and he expected a call soon. Mr. Chung did call, but only to tell Lam to stay home. Lam, told Mingo and Wright

that Chan said the connection would do 50 pounds at the time. (180-189, 217-222, 234, 249, 250, 261-264, 268-272, 275-278, 361, 362, 379-382, 612-614, 628-641, 884, 885, 917, 935, 936, 938, 1397-1400, 1404-1406, 1412-1415, 1418, 1422-1426, 1442-1460, 1463-1467, 1502, 1511, 1512).

On the representation by Lam that a big narcotics deal would be arranged in Hong Kong on April 18th, Mingo and Wright flew to Hong Kong. Lam also travelled to Hong Kong. Adhering to a general scheme devised by Lam which incidentally conformed to the Drug Enforcement Administration's plan, Mingo and Wright became residents of the Hyatt Regency Hotel in Hong Kong. Equipped with a recorder Wright attempted to call Chan at his home. Through telepathy - Wright speaking no Chinese and the voice at the other end no English - Wright left a message. This conversation was not recorded (recorder malfunction) nor were any of the conversations of the many meetings at Wright and Lam's room number 1352. (278, 279, 412, 413, 418, 419, 447, 641, 642, 964-966, 977-980).

With room 1352 as the focal point the officers began protracted negotiation. "Chan" came along to help Lam milk \$10,000 to \$15,000 from the government on the pretext that such money as needed for packing and storing the heroin. DEA agents in Hong Kong foiled Lam's bunco by forbidding the payment of any money until heroin was exhibited. Lam was unable to come up with any heroin except a small sample which he displayed to Mingo and Wright. Officials of the DEA in Hong

Kong suspected that Lam was incapable of fulfilling his grandiose promises and hence their reluctance to part with government money. It was Mingo and Wright's ploy that they were pimps and hustlers in the employ of a fictitious "Johnny" and that "Johnny" was a tough negotiator holding approximately \$225,000 in a safety deposit box in Hong Kong that kept Lam dangling also the prospect of becoming a millionaire by a partnership with Mingo and Wright wetted Lam's appetite. (173-175, 280-282, 291, 293, 295-302, 306-312, 320-322, 391-393, 412-414, 437, 438, 450, 451, 463, 470, 471, 613-645, 647-650, 653-660, 668-670, 675-679, 998, 999, 1007, 1467-1471, 1512).

With the prospect of luxuriating in the Caribbean Lam couldn't keep the deal straight. In New York he told the officers that payment would be made in New York for 100 pounds of heroin at a cost of \$2,000 to \$3,000 per pound. Then Lam requested that money be paid in Hong Kong; half there and half in New York; raising the price. Finally in Hong Kong the price stabilized at \$4600 per pound and the amount reduced to 10 pounds. While no front money was requested in New York full payment was demanded in Hong Kong plus \$5,000 to \$7,000 for expenses. (153, 172, 175-180, 182, 280, 281, 291-293, 306, 309, 311, 384, 389, 591, 595, 610, 645, 653-656, 675, 689, 690, 998, 999).

This reduction was revealed to the police officers in room 1352 on April 22nd when Lam was accompanied by appellant;

appellant's first encounter with Mingo and Wright. According to Mingo it was Lam who told the officers that Lam negotiated a reduction; as per Wright, Lam divides the credit between himself and appellant. It was all the same - Greek to appellant - he doesn't speak English. Johnny again became the reason for not releasing government money, Wright pretending a search for Johnny in Hong Kong while actually contacting the DEA. Again the DEA refused to part with any money and the deal was aborted. Lam and the police officers returned to New York and Chan went about his business in the Orient. Appellant who had been in Hong Kong to marry and honeymoon, departed Hong Kong April 26th, arriving in the United States May 10, 1974. (312-317, 320-322, 453, 478, 687-691, 1194, 1312-1314, 1430-1433, 1471).

In the United States Lam and the officers took up where they left off. A deal involving Sonny fell through over front money.* The narcotics are sold and Lam told the officers he has to find a different source. Appellant having arrived in New York is again paraded as a source of heroin and a nephew of the connection. Negotiations are begun for five tickets, then five sheets between Lam and the police officer. First the deal is delayed because the connection is in Boston. Then there is a delay because the heroin is in

* Prior to leaving for Hong Kong a deal between Sonny's group and Wright and Mingo was not consummated; the officers concentrating on the Hong Kong deal (214-216).

New Jersey. In a telephone conversation between Lam and Wright, Lam told Wright that he is putting appellant on the telephone. Appellant who speaks no English told Wright who speaks no Chinese that his New Jersey friend went to Boston and will return Friday. A like telephone call this time between Lam and Mingo again Lam purports to put appellant on the telephone to discuss his "friend". At the conclusion of this conversation Mingo asked if he had just spoken to Charlie Chan. May 30, 1974, when according to Lam appellant would have returned from Boston, is set for the transfer of 1-1/2 babies. A host of officers are dispatched to the meeting place, 6th Street and First Avenue. Officer Wright equipped with recording devices concealed in a bag drove to the meeting with undercover officer Mingo. On 6th Street the police officers ran into Michael and assuming that he is connected with the deal almost blow it. When Lam arrived he is angered informing the officers that Michael is not part of the deal. Lam in his eagerness to receive \$3,000 in expense money for his trip to Hong Kong forgot his anger and requests to see the money. "Johnny" a/k/a Special Agent Pope brought over an attache case containing \$45,000; \$3,000 for Lam's Hong Kong expenses. Lam handed the attache case back to Pope and told Wright to drive to 3rd Street between 2nd and 3rd Avenue. Wright complied with Pope with a posse of agents and police officers close behind. When

the disguised government vehicle stopped on 3rd Street Lam requested Mingo accompany him. They entered 59 East 3rd Street and took the elevator. At their destination Lam went to apartment 6C and opened the door with keys he removed from his pocket. Mingo followed Lam into the apartment, remaining in the kitchen while Lam searched to see if anybody is in the apartment. On entering the kitchen after the search, Lam removed a package from the garbage and handed it to Mingo. Mingo took the package and he and Lam come downstairs to be arrested. (700-702, 708, 710-712, 724-735, 741-747, 749-754, 757, 761, 764-766, 772-776, 781-787, 793-796, 798-802, 807-816, 1091-1117, 1120-1144, 1194, 1249, 1250, 1257, 1260, 1267, 1291-1294, 1297).

The keys to apartment 6C are recovered from Lam and police officers and agents converge on 59 East 3rd Street. Officer Mingo looks at the directory to discover that the apartment is listed to appellant. Five officers then ascend on apartment 6C. Finding no one at home they leave. Downstairs one of the officers spots a man standing on the crowded street. Mingo is consulted and appellant is arrested in the street. (1136-1144, 1192, 1193, 1201, 1202, 1206, 1250-1252, 1260, 1262-1264, 1273, 1274, 1276, 1277, 1281, 1294-1299).

POINT I:

INDEPENDENT NON-HEARSAY EVIDENCE OF APPELLANT'S
ENTRANCE INTO THE CONSPIRACY WAS LACKING.

Lam, promoter extraordinary, promoted appellant as the connection or the nephew of the connection. Appellant who had travelled to Hong Kong to marry and honeymoon was transformed into the man Lam sent to Hong Kong to arrange a 100 pound narcotics purchase. In Hong Kong Lam displayed appellant as the person from whom Wright would receive 10 pounds of heroin. Appellant, apparently unable to comprehend his eminent position remained silent throughout the entire conversation. Again in New York Lam accorded appellant the lofty position of nephew to the connection. This connection according to Lam would be able to supply the government with a pound and a half of heroin. Lam's puffing of appellant as a major narcotics dealer continued in two telephone conversations where someone professing to be appellant was placed on the telephone to speak once to Wright and on another telephone call to Mingo. Neither officer had ever heard appellant's voice before. According to Wright the voice that he spoke to told him a friend was in Boston expecting to return Friday. Mingo had a telephone conversation with a person whom Lam said was appellant and Mingo referred to as Charlie Chan, concerning the friend. Although a transfer of heroin occurred in an apartment whose directory lists appellant as the designee, appellant was never observed in the apartment.

Accordingly there is no proof absent Lam's puffing that appellant was a member of the Lam-Mingo-Wright conspiracy. Mere presence at Mingo and Lam's room at the Hyatt Regency Hotel in Hong Kong can only be deemed evidence of association:

"Membership in a conspiracy is not established by evidence of mere association with conspirators".
(U.S. v. Torres, 519 F. 2d 723, 726).

Where the government has failed to show that appellant, "was aware of the narcotics transaction...it proved no more than mere association...which cannot be the basis of an inference of guilt."
(U.S. v. Cirillo, 499 F. 2d 872, 866.)

That appellant allegedly engaged Mingo and Wright in telephone conversations concerning the mysterious friend who was in Boston is likewise no basis for an inference of guilt. Neither Mingo or Wright having heard appellant's voice prior to this conversation were in a position to identify appellant as the speaker; Wright referring to the voice on the other end as a person (784) and Mingo to the voice as Charlie Chan (1178, 1179). It is only Lam's word that the speaker in Lam's office is appellant as it is Lam's word that appellant is the connection's nephew - all hearsay. See U.S. v. Cirillo, supra, 885 where this Court to dispel the notion that every pronouncement of a co-conspirator as to the existence of a partner or in this case a connection, can be deemed a verbal act. Lam had been shown unreliable as evidenced by the Hong Kong DEA officers unwillingness to part with any money when their investigation revealed Lam was unable to supply the narcotics promised. The "ring of reliability" that the voice Lam said was appellant's certainly was missing in this instance. See U.S. v.

Manfreddi, 488 F. 2d 588, 596. Therefore Lam's claim to Wright that appellant wanted to speak to him is worthy of no greater reliability than Lam's other hearsay statements concerning appellant.

Use of an apartment where the directory shows appellant to be listed as the tenant is at most equivocal. Appellant was not present in the apartment during or after the transfer of narcotics. As in U.S. v. Steinberg, 525 F. 2d 1126, the government failed to show that appellant was more than a friend of Lam who allowed Lam to use his apartment. There was no showing independent of hearsay that appellant had any stake in the outcome of Lam's venture. Allowing the jury to rely on the many hearsay statements of Lam with the slightest showing that appellant made some affirmative act to participate in Lam's venture denied appellant a fair trial. U.S. v. Falcone, 109 F. 2d 579.

POINT II

VARIANCE IN PROOF BETWEEN AN INDICTMENT CHARGING ONE CONSPIRACY AND PROOF AT TRIAL SHOWING AT LEAST FOUR CONSPIRACIES AFFECTED APPELLANT'S RIGHT TO BE TRIED FOR THE CRIME CHARGED AND NOT HAVE EVIDENCE OF OTHER CONSPIRACIES SPILL OVER INTO THE JURY'S DELIBERATION OF APPELLANT'S GUILT OR INNOCENCE.

"The only common factor linking the transactions with the presence of [Lam and Wright]. This type of nexus has never been held sufficient [for joinder in one overall conspiracy trial]." U.S. v. Bertolotti, (2nd Cir.) Slip Opinion 1196-1261, decided 11/10/75.

In every transaction testified to by undercover officers Wright and Mingo, Lam was the agent. He brought the officers together with Sonny, Michael and Robert for a deal involving 1-1/2 pounds of heroin. He attempted to set up another deal between the parties but the government had an eye for a 100 pounds of heroin in Hong Kong. Acting as an agent, Lam sought to arrange the Hong Kong deal which fell through. In New York, a deal between Sonny, Michael and Robert and the government operators brokered by Lam also fell through. Another deal in which the heroin was located in an apartment listed to appellant on the directory has Lam acting as agent for the New Jersey connection. Each one of these transactions are separate and distinct comprising a wholly different conspiracy whose only nexus is the officers and Lam. That only three defendants were involved did not shorten trial time. As in Bertolotti, the trial lasted for almost one month. Three conspiracies involving Sonny,

Robert and Michael which had nothing to do with appellant expended much trial time. This is a case where an alleged participant in possibly two conspiracies where the proof was meager was "forced to sit through weeks of damaging evidence relating to another". U.S. v. Miley, 513 F. 2d 1191, 1209.

Harm was compounded by the Court's refusal to charge multiple conspiracies. (1606). By charging the jury all or nothing the question of whether there was one or more conspiracies was removed from the jury's consideration and left to the determination of the Court. See U.S.A. v. Harold Finkelstein, 526 F. 2d 517. A refusal to sever count 2 of the indictment, a possessory count, charged only as against appellant further prejudiced appellant's right to a fair trial. Appellant was unable to present evidence that a co-defendant Jimmy Lam had been found guilty in the state court of this very charge. (1348). Appellant was thereby prevented from bringing forward significant evidence of innocence as a result of having the second count of the indictment, the possessory count, tried together with the conspiracy count. See U.S. v. Larson, 526 F. 2d 256, 259.

POINT III:

MANY IMPROPRIETIES ENGAGED IN BY THE PROSECUTOR
DURING THE OPENING STATEMENT AND THE COURSE OF
THE TRIAL AND DURING SUMMATION PREJUDICED
APPELLANT'S RIGHT TO A FAIR TRIAL.

Before defense counsel had a chance to speak the prosecution in its opening statement commented about appellant's right to remain silent:

"In any case, if the defendant should disagree that what we are playing is an accurate sample, the government has made all the tapes available to defendants to listen to and they have the right to play them to you on their own." (P. 50)

This comment was also a clever reference to the prosecution's integrity in making evidence available to the defense. The jury was told that the government had reams and volumes and mountains of evidence that the jury was not going to hear.

"I would like to make two comments about the tape recordings that you will be hearing in this case.

First of all, more than 150 conversations were recorded during the investigation of this case. If all of these recordings were to be played during this trial you would probably be here until Christmas.

Therefore, the government intends to play only 10 to 15 of these 150 recorded conversations.

We believe that the recordings that we are going to play to you constitute a fair and correct sample of the conversations that took place." (P. 49, 50).

Not content with telling the jury what the government will not prove, the prosecution enlightened the jury on what the grand jury could have charged:

" First of all, from my description of the May 30th sale of a pound and a half of heroin it may have occurred to some of you that although the indictment only charges Francisco Li Ganoza with making that sale, the government could have also charged Jimmy Lam." (P. 52)

Confiding in the jury the problems of trying a case such as this the prosecution stated at page 54:

"In order to save time during this trial I have asked Detective Wright and Police Officer Mingo on occasions when they both attended meetings here in the United States if only the first one to testify about that meeting would touch on the meeting.

In other words the second officer to appear who could testify about the meeting, I have asked him to skip over the meeting, because the first officer will testify about it."

An attempt was made by the prosecution to bring race into the deliberation of this case by referring to the government's two star witnesses, the undercover officers Mingo and Wright, as "black customers" (p. 41, 44).

During the course of the trial the prosecution could not simply object but felt compelled to testify:

"Mr. Timbers: Objection, Your Honor. The question is impossible for this witness to answer. He has never heard any complete tapes."

Such testimony continued throughout the trial, at page 543:

"Mr. Timbers: No, no, Your Honor. The problem is we are talking about two different matters. We are talking about expense money which was requested at different times, \$15,000, \$10,000 and \$7,000 and \$5,000..."

"Mr. Timbers: -- and Officer Mingo had previously testified on the \$4,600 he was never asked for that in advance, and Mr. Corriero just asked a question that presumed that the \$4,600 was to be paid in advance and I object to the form."

Continuing in this vein Mr. Timbers testified at page 1210 and 1211:

"In any case, the issue is what happened coming down from the apartment not what is said on the tape. The tape obviously speaks for itself."

"I think I am entitled to bring out now how it is that Officer Mingo has refreshed his recollection since yesterday in order to give the testimony he is now giving on the underlying question, which is who had the keys when Jimmy Lam and Officer Mingo came down from the apartment."

Speeches were also substituted for objections:

"Mr. Timbers: Your Honor I object to reading this question out of context. May the preceding question be read?"

"Mr. Rosenthal: I will not read the preceding question. I don't really know what it is right now."

"The Court: Well the Court will if it is read out of context."

"What was the page?"

"Mr. Timbers: 175."

"Mr. Rosenthal: I don't think it is out of context."

"The Court: Well, we will have to leave that to the jury."

"Mr. Timbers: My point is --"

"Mr. Rosenthal: I object to Mr. Timbers making any speeches before the jury."

"Mr. Timbers: I'm not going to say anything about the substance, Mr. Rosenthal."

"The question that Mr. Rosenthal is referring to is asked in the context of the first question that is asked on that page, and I think it is misleading if he reads the third question without reading the first question.

"The Court: I don't follow you.

"Mr. Timbers: This is on 175, Your Honor. Mr. Rosenthal has read the question that begins on line 13 of 175. My point is that it is unfair for him to read that question without referring to the question that begins on line 7 of page 175."

Two pages later at 400 Mr. Timbers again speechifies:

"I don't see what the relevance of this point is, Mr. Rosenthal. You were refreshing the witnesses' recollection."

Again on page 424 Mr. Timbers perchant for oration is again evidenced:

"Objection. The ground of objection is relevance.

"This witness' opinion as to whether the translation was right or not is irrelevant. We have a transcript and a translation in evidence that is the best evidence."

Continuing his oration on page 538:

"Your Honor, I don't think there is any dispute about this. The whole point of my question was to clarify this issue. I don't think there is anything to be gone into on recross, and I object to the question."

This continued on page 542:

"Objection. The question is unfair. Mr. Corriero's question is when he asked for the \$4,600 in advance. Officer Mingo just testified that he never asked for the \$4,600 in advance, and I object to the form of the question."

A final pre-summation speech occurred on page 546:

"Mr. Corriero's question is, the first time the concept of 100 pounds was discussed. I object to the form of the question because the meaning is unclear, the concept of 100 pounds.

"He can ask what was the first time a 100 pounds was discussed, but to ask about the first concept a 100 pounds was discussed is a very nebulous question, and I object to the use of the word 'concept'."

Comments such as these referring to defense counsel's objections and procedures continued throughout the trial:

"Mr. Timbers: Your Honor, I will be glad to resolve this. This is a very silly point."

On page 1063:

"Mr. Corriero, let me just object that this is improper procedure. I will be glad to let you do it, but the witness should be asked what his recollection is and if he has no recollection be invited to look at his reports. I will be glad to let you proceed in whatever way you want, but I simply want to record that this is not the proper way to proceed."

This continued on page 1181:

"Objection. He is simply arguing with the witness. The witness testified he had no recollection. I don't think Mr. Rosenthal's further questions about what he means by no recollection is proper."

The prosecution's misgivings about the Court's capabilities in trying this matter continued throughout the trial. And on one occasion the prosecutor completely ignored the Court's instructions:

"Q. When you were interviewed by Mr. Nesland did you, in fact, tell him that you had attended two meetings with Jimmy Lam and the undercover agents in New York?

"Mr. Corriero: If Your Honor please, I voice my objection --

"The Court: I thought I had ruled on it.

"Do you want to come up to the side bar?

"(At the bench) The Court: On what basis is this admissible against him after the conspiracy is terminated?

"Mr. Timbers: The question I want to ask Your Honor --

"The Court: The question you already asked him has already implicated Jimmy Lum.

"Mr. Timbers: Well, Mr. Chung is available for cross examination by Mr. Lum's counsel.

"Mr. Corriero: I don't see how I can avoid the inescapable differences.

"The Court: Well we will leave it to the Appellate Court.

"Mr. Timbers: In any case, let me say that the only reason I asked this question was to lead into my next question, which is: do you say at these meetings that you would go to Hong Kong to survey the heroin? (Sic)

"I believe that is admissible against this witness.

"The Court: Of course it is, but why did you ask him the first question?

"Mr. Timbers: I had thought Your Honor said it could go in.

"The Court : I made it very clear that statements by one conspirator were not binding on the other co-conspirators when you have had an arrest and the conspiracy is over. In your question you have tried to have him testify to a fact about Jimmy Lam. I don't like to get into that."

Continuing on page 1535:

"The Court: Don't apologize to me. Explain it to the Appellate Court.

Concluding at page 1536:

"The Court: Alright, if the damage is done, it is done."

On summation the prosecutor attempted to engage in scare tactics:

"The government submits that the reason David Chan went to that hotel room was because a lot more than \$5,000 was involved. If you do a little arthimetic you will realize that if a pound of heroin could be purchased in Hong Kong for \$5,000 and could be sold in New York City for \$25,000 that's \$20,000 profit a pound, a 100 pounds is 2 Million Dollars, and that is before the heroin is diluted, and I think if you have read anything about narcotics traffic you will know that the real money in heroin comes when you dilute the heroin. So there was a lot of money involved here and all three of these defendants stood to be millionaires if they succeeded. The talk on the tapes about being millionaires is not hot air this is what they would have been if they had succeeded."

Preceding this remark was a deliberate misstatement of the facts characterizing appellant as a supplier of Lam:

"I just said before Mr. Corriero rose that one of Jimmy Lam's sources of heroin was Francisco Li Gonaza." (1619)

This reference also was stated on page 1628:

"Now, the third defendant was Francisco Li Ganoza. As I already have said, the government submits to you that Francisco Li Ganoza was a heroin supplier for Jimmy Lam in New York City."

Most damaging however was the prosecutor's request to the jury to assess the demeanor of appellant. Appellant had not testified and this surreptitious attempt comment on appellant's failure to testify was most prejudicial:

"Now, you have seen Francisco LiGanoza here in the courtroom and you have heard the evidence in this case. Li Ganoza is, to use the word that has been very overworked in this case, cool. Li Ganoza does not pass the heroin himself, but whenever -- if you will think back -- whenever his heroin is being passed Li Ganoza is always around, off to the side someplace in the shadows, supervising and making sure that everything goes alright." (1630).

This Court has stated in U.S. v. Drummond, 481 F. 2d 62 that it will not hesitate to reverse a conviction on the inflammatory and improprieties remarks of the prosecution. It is submitted that the many improprieties outlined above are sufficient for reversal. In commenting on the prosecutor's placing matters not in evidence before the jury and commenting on the integrity of the government where such integrity is not impuned U.S. v. Berger, 295 U.S. 78. This Court has had occasion in U.S. v. McKendrick, 481 F. 2d 152, 153 to comment on the inclusion of race into a trial of a criminal case:

" ... surprising in this day and age since it represents, an appeal by the state ... the question whether racially prejudicial remarks by a prosecutor in summation constitutionally infected the conviction of appellant ..."

Continuing on page 59:

"Thus, the purpose and spirit of the 14th Amendment requires that prosecutions in state courts be free of racially prejudicial slurs and arguments. The standards for state prosecution in this regard is thus as high as the rigorous standards required of the federal courts by the 5th Amendment's due process clause."

While the prosecution in this case did not engage in racial slurs, the obvious meaning of "black customers" was to alert the jury to the drug problem among the black community.

Most prejudicial, however, was the prosecution's comments on the defense ability to represent evidence in its opening and requesting the jury to observe appellant. Griffin v. California, 380 U.S. 609 Forbids any prosecutorial comments on a defendant's failure to testify or present evidence. Pointing to appellant and asking the jury to look at appellant is just such a comment. See People v. Cwikla, 45 A.D. 2d 584, 360 N.Y.S. 2d 33.

Prosecution comments regarding appellant's failure to testify, is so fundamentally prejudicial, a failure to object notwithstanding this court should reverse. Nothing the trial court could say would irradiate the impotitic comment by the prosecution. See U.S. v. Natale (2nd Cir.) Slip Opinion 307 & 308, Dec. 11/28/75 and U.S. v. Singleton (2nd Cir.) Slip Opinion 219-422, Dec. 2/13/76.

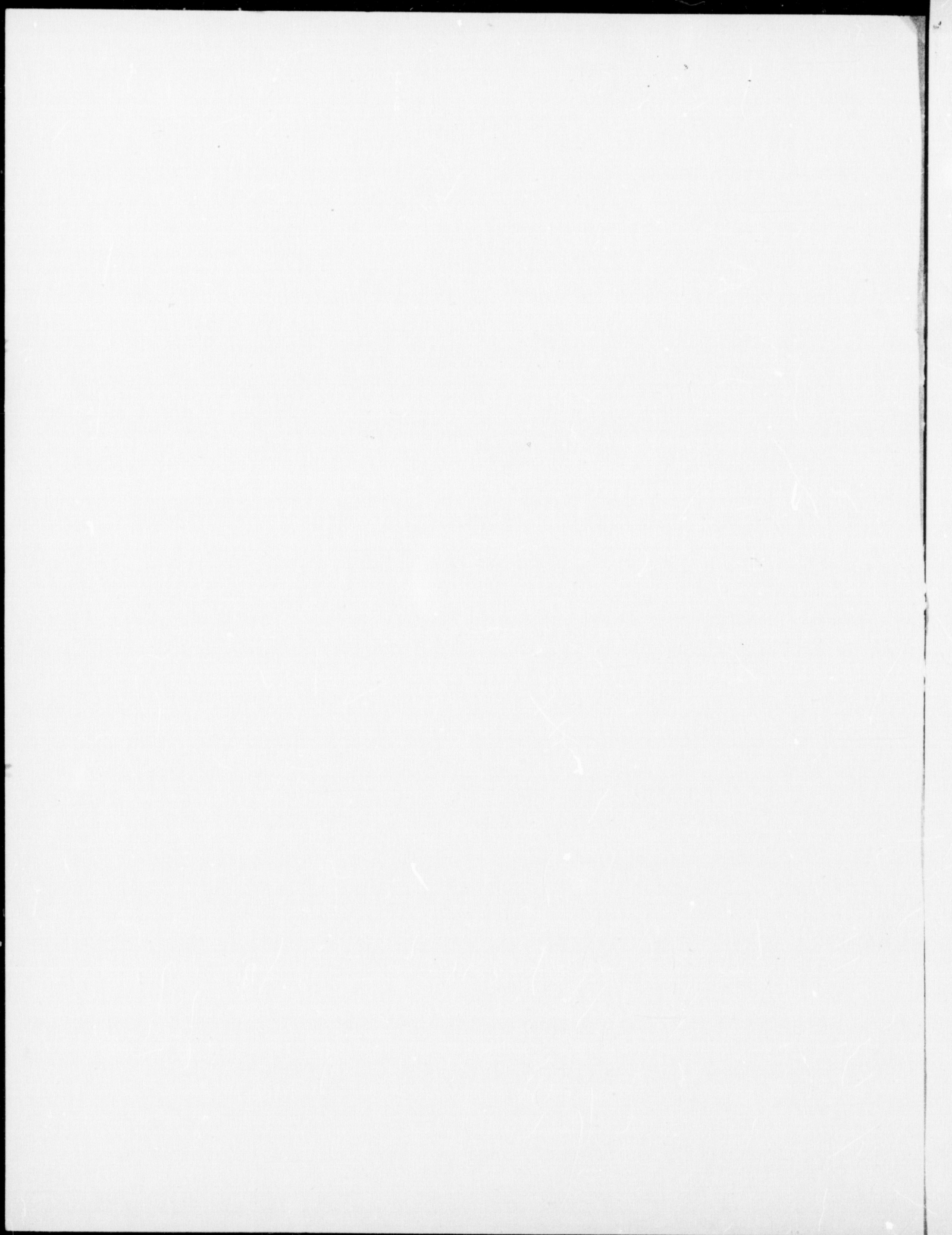
CONCLUSION

Appellant's conviction should be reversed and the indictment dismissed or in the alternative a new trial granted.

Respectfully submitted,

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Attorney for Appellant

JERALD ROSENTHAL
Of Counsel on the Brief



AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 5 day of March, 1976 at No. 1 St Andrews Place deponent served the within *Book* upon *VS Attorney* the *Appellate Brief* herein, by delivering a true copy thereof to personally. Deponent knew the person so served to be the person mentioned and described in said papers as the *Appellant* therein.

Sworn to before me,
this 5 day of March 19 76

Edward Bailey
.....
Edward Bailey

William Bailey
.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0182945
Qualified in Richmond County
Commission Expires March 30, 1976